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IN THE

Supreme Court of the United States

OCTOBER TERM 1969

No. 859

HISTORIC SMITHVILLE INN and QUAIL HILL,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioners, Historic Smithville Inn and Quail Hill, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered August 18, 1969 in *National Labor Relations Board* v. *Historic Smithville Inn and Quail Hill.*

Opinion Below

The opinion of the United States Court of Appeals for the Third Circuit is reported in 414 F. 2d 1358. It is reprinted in Appendix A hereto annexed.

Jurisdiction

The judgment of the Court of Appeals was entered on August 18, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

(1) Whether petitioners' constitutional rights of free speech under the First Amendment and petitioners' statutory rights under Sec. 8(c) NLRA were violated below by the finding, without substantial evidence, that the December 18, 1966 poll, conducted herein by petitioners (in order to determine the truth of the Union's insistent statement that petitioners' employees did not desire an NLRB election) interfered with the rights of petitioners' employees under Sec. 7 of the Act.

(2) Whether with respect to the discharge of employee, Margaret Jackson, petitioners' constitutional rights to due process under the Fifth Amendment to the United States Constitution were violated by the nationally significant manner in which respondent, without relevant substantial evidence (a) found that petitioners discharged one employee (Margaret Jackson) out of some 900, allegedly in violation of Section 8(a)(3) and (1) of the Act; (b) in effect operated on the theory that petitioners were guilty until they proved their innocence; and (c) in effect placed the burden of proof on petitioners, instead of on respondent.

Constitutional and Statutory Provisions Involved

This case involves Sections 8(a)(1) and (3) and 8(c) of the National Labor Relations Act, as amended, and the First and Fifth Amendments to the United States Constitution. These are reprinted in pertinent part in Appendix B, here to annexed.

Statement of the Case

A. The Factual Background

Petitioners, Smithville Inn and Quail Hill, are engaged in the business of operating restaurants in Smithville, New

Jersey. Although separately incorporated, the petitioners have common officers, ownership, directors and a common labor policy. They constitute a single integrated business enterprise, and are hereinafter sometimes collectively referred to as "the Company" (R. 8).[1]

On November 28, 1966, some of the Company's employees met with representatives of the Union[2] at its Atlantic City headquarters (R. 26, 69-70). There is no evidence on the record to show that petitioners or their officers or agents knew of this meeting. Those present apparently mapped out a campaign to organize the Company's employees. Employee Margaret Jackson and a few other employees took Union cards for distribution to fellow workers (R. 26, 70-71). Commencing on the following Wednesday night, November 30, and continuing every night thereafter until December 7, the Union held meetings for employees at Jo-Jo's Bar and the Beachcomber, establishments located near the petitioners' restaurants (R. 9-10, 68-74). The Union meetings were held at a public place; no effort at secrecy was made. Jo-Jo's was a frequent after-hours gathering place for respondents' employees and supervisors, many of whom, either regularly or occasionally, went there directly from work (R. 93, 13, 109, 129-130, 176, 196, 297, 304). This fact was well known to all concerned (R. 93). The record shows no evidence of surveillance of Union activities (R. 180, 182, 183, 187, 203, 245-246, 255-256, 264-265, 293, 304-305, 312-313, 328, 339, 365, 420-421), which the Trial Examiner and Board, nevertheless, found to exist on the basis of conjecture. The record merely shows that the Union held meetings in a public place without pretense at secrecy

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[1] "R" references are to the portions of the record printed in the Appendix. References preceding a semicolon are the Board's findings; those following are to the supporting evidence.

[2] Hotel, Motel and Restaurant Employees Union, Local 508, AFL-CIO.

and that, as usual, the place was attended by members of the public as well as employees and supervisors of respondents. There is absolutely no record evidence that any employee or supervisor reported the meetings to respondents' management or that the latter authorized surveillance. On the contrary, the substantial evidence in the record is completely contrary to such surveillance (R. 182-183, 187, 256, 293, 304-305, 365).

Charles Miller, a supervisor, candidly testified that he heard rumors that there was going to be a meeting of employees at Jo-Jo's and that "a certain amount of curiosity * * * prompted me to stop there" (R. 181). No meeting was in progress when he arrived there (R. 138-139, 201, 274-278). He flatly denied: spying (R. 180, 182-183, 187), receiving any management instructions to place employees under surveillance (R. 187), and giving any report of the meetings to management (R. 182, 187). Only guesswork or inference from speculation served as the Trial Examiner's and Board's basis for finding labor spying in this case. That conjecture was contradicted by the record (R. 180, 182, 183, 187, 203, 255-256, 328, 339, 370, 244-247, 264-265, 293, 307, 304-305, 312-313, 328, 339, 365, 420-421).

The gross manner in which the Trial Examiner relied on *inference from conjecture* appears from this sample of his "reasoning":

> "Its likely that Miller told Mrs. Noyes this fact, if it is a fact * * *." (R. 16)

Respondent and Trial Examiner, relying on *no evidence* in the record, expressed grave doubt that petitioners prepared the "Questionnaire" simply because Union leader Timperio said the employees wanted a card check rather than a vote. Nobody on behalf of the Union denied petitioners' testimony in this respect (R. 378-379, 381-382).

The questionnaire or Voluntary Statement of Employees (G. C. Exh. 2) *on its face* (R. 391) showed that it was being used because the Union claimed that the employees wanted a card-check. The Trial Examiner's "grave doubt" (R. 24) can scarcely be the basis for making a finding of fact.

Also without record evidence, the Trial Examiner with the Board's approval concluded that the questionnaire was predicated on the assumption that a majority of respondents' employees had signed cards designating the Union to represent them. The uncontradicted evidence in the record flatly contradicts this *assumption* (R. 391, 392-393, 424-425, 428). The Union had only a few signed pledge cards (R. 384).

Respondents' decision to discharge Margaret Jackson for chronic tardiness came *before* any of those management officials who made that decision knew of Mrs. Jackson's affiliation with or sympathy for the Union (R. 199-201, 225-226, 228-229, 234, 269, 326-327, 349-350, 364-365, 367-368). The cited record evidence is uncontradicted.

Petitioners repeatedly told their employees that they were free to join the Union or not to join it and that they need fear no reprisal if they joined (G. C. Exh. 3; R. 113, 173, 220, 258-259, 265, 289-290, 294, 304, 327-328, 349, 391, 393, 399, 420-421, 422, 423). The Company knew nothing of Mrs. Jackson's Union activity on Wednesday evening, November 30, 1966. The Trial Examiner's contrary finding is without substantial evidence in the record. Indeed, all of the evidence (R. 347, 269-271, 272, 298, 327, 350-351, 364-365, 367) refutes this.

Jackson allegedly distributed Union cards on November 30 (R. 26); but the decision to dismiss her had been made on November 28, 1966, as uncontradicted, credible testimony shows (R. 350-351, 367, 368-369, 343, 345, 325-326, 220-226, 229).

The Trial Examiner's footnote 14 (R. 28) suggests that only one witness (Merrill) testified that he was ignorant of Jackson's Union activity prior to her discharge. In fact, however, such testimony was given by Lois Muller (R. 226). Elizabeth Moore (R. 272), John Gruhle (R. 234), Chuck Miller (R. 199-201), John Hand (R. 298), William Crawford (R. 244-245), John Ferrie (R. 310), Charles Grosskopf (R. 338) and Godfrey Schmidt (R. 310). They all testified, as did (R. 327) Robert Merrill, that they had no previous knowledge of Union activity by Jackson or by anyone else.

B. The Proceedings Below

On December 5, 1966 the Union (Hotel, Motel and Restaurant Employees Union, Local 508, AFL-CIO, filed its charges herein against petitioners. The NLRB Regional Director, after investigation, dismissed the charges as unsuported by the evidence. The Union appealed; and the General Counsel reversed the Regional Director. The General Counsel of NLRB issued the consolidated complaint herein on April 3, 1967. The trial, before Trial Examiner George J. Bott, took place at Atlantic City, New Jersey on May 16 and 17, 1967. The Trial Examiner's Decision was dated August 29th, 1967. Respondent's application for enforcement was dated September 27, 1968.

Argument before the Third Circuit was heard on June 3, 1969; and Third Circuit's decision was dated July 18, 1969. The Judgment of that Court was entered August 18, 1969.

Reasons for Granting the Writ

1. In the matter of the questionnaire, the rulings of the tribunals below violate the First Amendment to the United States Constitution and Section 8(c) of the National Labor Relations Act, presenting a novel question important to the choice between NLRB elections and card-shows.

2. As to Margaret Jackson's discharge there was a nationally significant failure of due process under the Fifth Amendment to the United States Constitution because the decisions below:

(a) were not based on record evidence;

(b) were the result of requiring the employer to carry the burden of proof and to justify Margaret Jackson's discharge, rather than the result of General Counsel's proof of discharge for union activity;

(c) were the product of the Trial Examiner's belief that opposition to unionization by lawful, non-coercive speech spelled out prohibited hostility to concerted activity;

(d) were based upon suppositions, assumptions and conjectures rather than on trustworthy, substantial evidence in the record as a whole;

(e) were predicated on disregard of such evidence in the record.

3. The issues involved are of general and repeated relevance to the administration of national labor laws and policy.

4. The reviewing Court below was not barred from setting aside the Board's decisions respecting the questionnaire and the discharge of Margaret Jackson because no substantial, trustworthy evidence supporting these Board decisions can be found in the record viewed in its entirety.

5. Especially now that a *show of cards,* rather than an *election under NLRB* supervision, is more and more encouraged by Court and Board decisions (See Syracuse L. Rev., "Authorization cards as valid indicators of Union Majorities" by LeRoy H. Schramm, Vol. 20 No. 3, Spring, 1969, pp. 578-599), the wishes of the employees involved

deserve respect on the question whether one or the other of these two methods of testing employee free choice should be used. Likewise, the good-faith doubts of employers respecting choice between these two methods should be subject to an employer poll which establishes the employees' actual preferences for or against NLRB election, where (as here) the Union presumes to assert those preferences, and to base its strike on that assertion.

The polling represented by the questionnaire was not a polling as to sympathy for or against the Union nor a polling to reveal the employees' choice of a bargaining agent. See the full text of the "questionnaire" in footnote 5 of the opinion below.

No coercive, anti-union speech was first made as prelude to the request for execution of the questionnaire.

Above all there was no intent or effect at any time of placing employees in fear of their jobs. They were always assured that their jobs would be safe, no matter what their concerted activity (R. 113, 173, 220, 258-259, 265, 289-290, 294, 304, 327-328, 349, 391, 393, 399, 420-423 and G. C. Exh. 3). No denial of this appears in the Record.

The *voluntary* statement which was the "questionnaire" (General Counsel's Exhibit 2) was dated December 18, 1966. The following quotation from that document is significant:

> "* * * My employer doubts the Union's *claim* of majority support and regards signed union-application cards as, in the circumstances, a most unreliable method of showing a choice of a majority of Smithville Inn employees.
>
> "As an Employee of the Inn who is deeply interested in the involved dispute between my employer and the picketing unions and who has a stake in the outcome of the dispute, I've been asked by management to state my preference *without fear or favor* and on a completely *voluntary* basis. * * *

"I sign and initial this form freely and of my own volition, without any pressure or undue influence exerted upon me by any management representative or anyone else. My purpose is to inform my employer how I, as an affected employee, feel about the alternatives which cause the existing dispute between the Historic Smithville Inn and the picketing unions." (Italics in original.)

Respondent here, in good faith, wished to refute the claim, falsely repeated by Timperio, the Union leader (R. 381-383, 378-379, 428-429), that most of the employees at Smithville Inn preferred that management operate on the basis of a show of cards rather than upon the basis of an NLRB election.

Neither the questionnaire nor any of management's speeches nor any of management's leaflets to its employees revealed any employer *hostility* toward Union organizing (R. 391; G. C. Exh. 2; R. 393, 420-421, 421-422, 423, 424-425).

The question asked by the questionnaire did not go beyond the need for eliciting authoritatively the particular information which respondent sought for the purpose of refuting Timperio's reiterated claim (R. 381-383, 378-379, 428-429). The information sought was not of the kind which could be used *against* any employees or to pry from them secrets they wanted to keep or to invade their privacy.

6. On the subject of Margaret Jackson's discharge, the Board and the Court below found, without substantial or logically relevant evidence and contrary to uncontradicted, substantial evidence, that the employee was discharged for Union activity and not (as the only witnesses who testified on this subject said) because of Mrs. Jackson's chronic tardiness. In so acting, the tribunals below, in effect, acted on an unconstitutional presumption of peti-

tioners' guilt. They neglected due process by substituting assumption and supposition for proof and evidence. They reversed due procedure by requiring or expecting petitioners to assume the burden of proving that they did not commit the charged violations. They lightened the Board's burden of proof by regarding mere assumption (disguised as alleged but spurious inference) to serve as a vehicle to carry that burden. By this method of handling the record evidence bearing upon the discharge of Margaret Jackson, the tribunals below violated constitutional due process under the Fifth Amendment to the United States Constitution.

The very first day on which Jackson (R. 101) claimed that Management learned of her Union activity was Wednesday, November 30th after 5:30 P. M. But Management had already made its decision to discharge Jackson *in the morning of November 28th;* and Management did not know of Jackson's Union activity even on December 3rd. No evidence refutes the testimony of Management on this point (S.M. 226-229, 329-330; R. 234, 269, 272, 364-365).

Nor could anyone except the most captious find fault in the manner in which Jackson's discharge was effectuated. An adequate and ample investigation of her record was made. The time-clock did not lie. Not even Mrs. Jackson was disposed to question the accuracy of the time-clock recordings of her habitual tardiness (R. 114). Mrs. Noyes had long refrained from discharging Jackson, both because she was a good waitress while on the job and because of her invalid daughter. Gruhle and Merrill had many times before requested the discharge of Jackson (because they could not rely on her reporting for duty on time) and Mrs. Noyes had resisted. At long last, she gave her consent on November 28, 1966. She knew nothing of Jackson's Union affiliation or concerted activities on that date, on December 3, 1966, or at any time between those dates. Neither did anybody else in Management.

Mrs. Noyes decided to hold her final decision in abeyance when her lawyer asked her to do so, in order to give him an opportunity to weigh the matter legally. He did; and he concurred. The testimony on these points is uncontradicted by any record evidence (R. 349-350, 367-368, 326-327, 226, 343-345, 279-280).

Nothing in the record suggests that Jackson was singled out for special or different treatment. Management had handled similar situations in the same manner in the past; as the record indisputably shows.* That record comprises not only time-card records (for a relatively short period), but also and more importantly undisputed testimony of Gruhle, Merrill, Lois Muller and others about the nature and extent of Jackson's* tardiness and the comparative tardiness of others* to whom Jackson erroneously referred. A similar penalty was meted out in a similar manner for similar offenses by others in the past.

No employee who returned from the picket line to seek employment or who, having failed to work during the picketing, sought work after withdrawal of the pickets was denied employment (except Margaret Jackson, who was less zealous as a unionist than many who went back to their jobs). Many employees who had openly flaunted their pro-Union conduct were welcomed back without question and certainly without reprisal. So, too, would Margaret Jackson have been taken back, if she had not been discharged as a person hopelessly given over to habits of irremediable tardiness (R. 421-422, 393, 399, 421, 422, 265, 293-294).

7. It is respectfully submitted that the time has come for this Court to correct such failures of due process and to deprecate authoritatively the use of conjecture and facile assumption as evidence, misuse of the ordinary rules

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*R. 215-216, 267-370, 268-269, 326, Resp. Exh. 2, 5, 7, 8, 9, 10, 11, 12 and 13, R. 394-397, 404, 408-420.

respecting burden of proof, the unwarranted suppression of evidence by trial examiners and the Board by recourse to the lazy, wholesale formula: "I do not credit the employers' witnesses".

8. The questions presented in this petition are matters of general and national importance, in view of the relative frequency with which the NLRB and its Examiners have similarly conducted themselves in other cases. These questions involve important employer rights respecting union organizing campaigns and discharge of chronically tardy employees.

CONCLUSION

The judgment below should be reversed as to the discharge of Margaret Jackson and as to the poll by voluntary statement; or the writ should issue.

Respectfully submitted,

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Appendix A.

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to *encourage* or *discourage membership* in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held is provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other

than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no *threat* of *reprisal* or *force* or *promise* of *benefit.*

ARTICLES in addition to and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the original Constitution.

(ARTICLE I.)

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redness of grievances.

(ARTICLE V.)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix B.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

HISTORIC SMITHVILLE INN and Quail Hill, Respondent,

Hotel, Motel and Restaurant Employees Union, Local 508, AFL-CIO, Intervenor.

No. 17503.

United States Court of Appeals
Third Circuit.

Argued June 3, 1969.

Decided July 18, 1969.

Proceeding on petition for enforcement of order of National Labor Relations Board. The Court of Appeals, Van Dusen, Circuit Judge, held that evidence sustained Board's determination that employer's surveillance of employees interfered with and coerced employees in exercise of their self-organizational rights, and that employer's poll of employees which was made against background of employer's surveillance and discharge of one employee interfered with employees in exercise of their rights to organize.

Order enforced.

Cite as 414 F. 2d 1958 (1969)

Nan C. Bases, N. L. R. B., Washington, D. C., for petitioner (Arnold Ordman, Gen. Counsel, Dominick L. Manoli, Assoc. Gen. Counsel, Marcel Mallet-Prevost, Asst. Gen.

Counsel, William F. Wachter, Atty., N. L. R. B., on the brief).

Richard H. Markowitz, Wilderman, Markowitz & Kirschner, Philadelphia, Pa., for intervenor.

Godfrey P. Schmidt, New York City, for respondent.

Before KALODNER, VAN DUSEN and STAHL, Circuit Judges.

OPINION OF THE COURT

VAN DUSEN, Circuit Judge.

This case comes before us on application for enforcement of an order of the National Labor Relations Board (hereinafter "Board"). The Board found that the Company[1] violated § 8(a) (1), 29 U.S.C. § 158(a) (7), by unlawfully threatening, interrogating, and polling its employees, and by surveillance of their union activities.

On November 28, 1966, some of the Company's employees met with representatives of the Hotel, Motel, and Restaurant Employees Union[2] in Atlantic City, New Jersey. Certain employees, including Margaret Jackson whose discharge will be discussed below, then took Union cards for distribution to other employees. Following that first meeting, the Union held meetings for employees on November 30 and every night thereafter until December 7. These meetings were first held in a poolroom in Jo-Jo's Bar.[3] On December 1 and December 3, the Company's

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[1] There are actually two separate corporate respondents which operate restaurants in Smithville, New Jersey, but we shall refer to them in the singular because they have common officers, ownership, directors, and a common labor policy.

[2] Local 508, AFL-CIO.

[3] The poolroom is separated from the bar area by a partition and is entered through an opening near the main entrance to the estabment.

"coordinator," Mr. Miller, was present in the bar area at Jo-Jo's during the Union meeting. On December 3, the Union meeting was moved from Jo-Jo's to the Beachcomber Inn, where Mr. Miller also appeared.[4]

On December 2, the Union requested recognition as the employees' bargaining representative. The Company refused, asserting doubt about the Union's majority status. The Union called a strike and began to picket respondent on December 7. On December 18, the Company distributed a questionnaire entitled "Voluntary Statement By Employee"[5] to each employee in an attempt to poll them to determine whether they preferred a secret election conducted by the Board or a show of Union application cards to an impartial third party.

Charges of unfair labor practices were filed by the Union against the Company on December 5 and on December 9, 1966. General Counsel of the Board issued a consolidated complaint on April 3, 1967, alleging unfair labor practices

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[4] In addition to Mr. Miller, Assistant Chef Hand visited Jo-Jo's on December 1 during the Union meeting.

[5]

"VOLUNTARY STATEMENT BY EMPLOYEE

"Please remember that while your Employer asks you to sign and initial this form, you are under no obligation to do so unless you want to.

"I have been told by my Employer's representative that:

"1. The picketing Unions *claim* to represent a majority of the Smithville Inn Employees engaged in restaurant operations;

"2. The picketing unions want my Employer to regard the showing and counting of union application cards, heretofore collected by the picketing unions as proof of that *claim;*

"3. My Employer prefers a secret National Labor Relations Board election as the best way to prove whether Smithville Inn employees want or do not want a union;

(*footnote continued on following page*)

in violation of § 8(a) (1) and (3) of the National Labor Relations Act. A hearing was held on May 16 and 17, 1967, before Trial Examiner George Bott, who, in a decision issued August 29, 1967, found the Company had engaged in unfair labor practices. On January 10, 1968, the Board issued its decision and order adopting the findings, conclusions, and recommendations of the Trial Examiner.

(*footnote continued from previous page*)

"4. The picketing unions refused, from the beginning, and continue to refuse a fair, secret election conducted by the National Labor Relations Board as the method for proving their dubious *claim* and for ending the present picketing and strike;
"5. My Employer doubts the unions *claim* of majority support and regards signed, union-application cards as, in the circumstances, a most unreliable method of showing the choice of a majority of Smithville Inn Employees.

"As an Employee of the Inn who is deeply interested in the involved dispute between my Employer and the picketing unions and who has a stake in the outcome of the dispute, I have been asked by management to state my preference *without fear or favor* and on a completely *voluntary* basis.

"I have marked my choice in the appropriate box below by putting my initials in that box:

☐ I prefer a secret election conducted by the National Labor Relations Board as the best way of showing whether a majority of Smithville Inn Employees want or do not want a union.

☐ I prefer a show of union application cards to some impartial third party as the best way of showing whether Smithville Inn Employees want or do not want a union.

"I sign and initial this form *freely* and *of my own volition* without any pressure or undue influence exerted upon me by any management representative or anyone else. My purpose is to inform my Employer how I, as an effected Employee,

Line Missing— in Copy

Smithville Inn and the picketing unions. SUNDAY, DECEMBER 18, 1966.

. . . . . .

PLEASE SIGN HERE"

Appendix B.

The issues are whether there is substantial evidence on the record as a whole to support the Board's findings that (a) the Company interfered with, restrained, and coerced its employees in the exercise of their statutory rights, in violation of § 8(a) (1) of the Act (29 U.S.C. § 158(a) (1)); (b) the Company discharged Margaret Jackson because of her Union activities, in violation of § 8(a) (3) and (1) of the Act (29 U.S.C. § 158(a) (3) and (1)); and (c) the December 18 poll interfered with the employees in the exercise of their § 7 (29 U.S.C. § 157) rights.

We hold that there is substantial evidence in the record as a whole to support the Board's findings.

[1] We can find no error in the Board's determination that the surveillance of Company employees interfered with and coerced the employees in the exercise of their self-organizational rights, in violation of § 8(a) (1). See N. L. R. B. v. Morris Fishman and Sons, Inc., 278 F.2d 792, 796 (3rd Cir. 1960); N. L. R. B. v. Rockwell Manufacturing Co. (Du Bois Div.), 271 F.2d 109 (3rd Cir. 1959). The Board's finding of surveillance is supported by the testimony of the Company coordinator, Mr. Miller, and by the testimony of the Assistant Chef, Mr. Hand.[6] From the

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[6] Mr. Miller testified that he was present at Jo-Jo's Bar both on December 1 and on December 3 while the Union meetings were in progress. While that fact alone may be insufficient to establish surveillance of Company employees, additional testimony given by Mr. Miller supports the Board's finding. Mr. Miller had been a regular patron of Jo-Jo's until August or September of 1966; thereafter, he did not visit Jo-Jo's until the middle of November. Mr. Miller also testified that he may have been prompted to stop at Jo.Jo's on December 1 by a "certain amount of curiosity", and he "probably assumed" another meeting would be held Saturday, December 3, when he returned. In addition, when the Union meeting moved from Jo-Jo's to the Beachcomber Inn, Mr. Miller left the former and went in a position to observe those employees who attended the meeting.

Mr. Hand also testified that he visited Jo-Jo's on December 1 while the Union meeting was in prograss.

facts related in their testimony, the Board could properly infer that Miller and Hand were present for the purpose of monitoring the employees' Union activities.

[2, 3] There is no dispute that Margaret Jackson was chronically late for work while employed by the Company.[7] That fact alone could constitute a non-discriminatory basis for discharge, but if the discharge was motivated, even in part, by union activity, it is illegal despite the existence of adequate cause for firing her. See N. L. R. B. v. Barberton Plastics Products, Inc., 354 F.2d 66, 68 (6th Cir. 1965). Although the witnesses gave conflicting testimony,[8] we find that there was sufficient evidence to support the Board's

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[7] Mrs. Jackson confirmed the Company's charge in the following testimony:

"Q. Were you late as charged by the Company?
"A. Yes, I was late."

Although she had a long history of being late, this defect did not increase during the period prior to her dismissal. She had been employed by the Company as a waitress for more than five years prior to her discharge on December 3, 1966, and she was admittedly a good waitress.

[8] Some of the Company witnesses testified that the decision to discharge Mrs. Jackson was made because she was habitually tardy, and that the decision was made on November 28, two days before she claimed the Company first learned of her Union activity. Mrs. Jackson was not actually discharged until December 3. Mrs. Noyes, the co-possessor of the Company, explained that the lapse of time from November 28 to December 3 was occasioned by the advice of counsel, who told her not to discharge anyone until he arrived on December 3. Counsel testified that he gave such advice. The testimony of dining room manager Gruhle is not as precise. He recommended Mrs. Jackson's discharge "possibly in late November", but he was unable to specify the date on which he discussed the discharge with Mrs. Noyes. Mr. Gruhle could only recall that a period of days elapsed between the time he recommended Mrs. Jackson's discharge and the date she was discharged. Mr. Merrill, manager of the Smithville Inn, testified that the last time he recommended Mrs. Jackson's discharge was just before Thanksgiving in 1966 and Mrs. Noyes "wanted to think about it." He reported back to Mrs. Noyes on November 20 or 27.

(*footnote continued on following page*)

finding that Margaret Jackson's discharge was, at least in part, due to her Union activity.[9]

[4-6] We must consider the interests of the Company and the effect on the employees in determining the propriety of the poll. An employer may have a legitimate interest in polling his employees to determine whether a union demanding recognition actually represents a majority of the employees or to defend itself against an unfair labor charge, but we must also recognize that the employee being polled may fear management reprisal for

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(*footnote continued from previous page*)

The Trial Examiner, whose findings this testimony of respondent's witnesses. He found that the Company was substantially motivated by union considerations in discharging Mrs. Jackson on December 3 on the basis of testimony that she attended the Union organizational meeting on November 28; distributed Union cards at the Smithville Inn in the presence of Mrs. Miller, Mrs. Noyes' sister; was searched for Union cards by Assistant Chef Hand on November 30; was seen at Union Meetings at Jo-Jo's and The Beachcomber Inn by coordinator Miller; introduced Mr. Hand to Union president Timperio no later than December 1; and was discharged contrary to the Company's custom by which an employee is permitted to finish out the week.

From this evidence, credited by the Trial Examiner, it was not illogical for the Board to infer that the decision to discharge Mrs. Jackson was made after November 28 and was based in some part on her Union activities.

[9] In N. L. R. B. v. Buitoni Foods Corp., 298 F.2d 169, 174 (3rd Cir. 1962), we said:

> "We observe * * * that where * * * contradictory reasons for the discharge of an employee are advanced, it is the responsibility of the Board to weigh the evidence and resolve the factual conflict. * * * There is clearly no obligation on the Board to accept at face value the reason advanced by the employer. The concurrent existence of an otherwise valid reason for the discharge of an employee does not preclude a factual determination that his discharge was discriminatory if it appears from a preponderance of evidence, and the reasonable inferences drawn therefrom, that the discharge was in fact motivated by the employer's opposition to the employee's union activities."

See. also, Hugh H. Wilson Corporation v. N. L. R. B., 414 F.2d 1345 (3rd Cir. July 3, 1969).

support of the union. Cf. National Labor Relations Bd. v. Essex Wire Corp., 245 F.2d 589, 592 (9th Cir. 1957). The test to determine legality of the poll, applicable when this case arose, was "whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." Blue Flash Express Co., 109 N. L. R. B. 591, 593 (1954).[10] We hold that the Board's finding that the December 18 poll interfered with the employees in the exercise of their § 7 rights is supported by substantial evidence on the record as a whole.

The poll was taken against a background of unfair labor practices in the form of surveillance and the discharge of an employee because of union activity. The form on which the poll was taken clearly sought employee identification, both by signature at the end and by initials in the box indicating the alternative chosen. The Board also adopted the Trial Examiner's finding that inadequate assurances against reprisals were given. That finding is particularly apt where employees who have been exposed to certain unfair labor practices are then requested to fill out a form which seeks their identification and makes inquiry regarding their alignment with union or management.

The Board's order will be enforced.

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[10] While we apply the *Blue Flash* test on this record, we note that the Board has revised the criteria for judging legitimacy of interrogation in Struksnes Construction Co., Inc., 165 N. L. R. B. No. 102, 65 LRRM 1385, 1386 (1967), where it said:

> "Absent unusual circumstances, the polling of employees by an employer will be violative of Section 8(a) (1) of the Act unless the following safeguards are observed: (1) the purpose of the poll is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere."

We note the recent Supreme Court decision in N. L. R. B. v. Gissel Packing Co., 395 U.S. 575, 89 S.Ct. 1918, 23 L.Ed. 2d 547 (1969), where the court cited with apparent approval the abovementioned *Struksnes Construction Co.* decision.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 859

HISTORIC SMITHVILLE INN AND QUAIL HILL,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15–22) is reported at 414 F. 2d 1358. The Board's decision and order (R. 45–46)[1] are reported at 169 NLRB No. 23.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1969 (Pet. 1). The petition for a writ

[1] "R." references are to portions of the record printed in the appendix to the briefs in the court below. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

371-448—69

of certiorari was filed on November 17, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether substantial evidence supports the finding of the National Labor Relations Board that the employer discharged an employee because of her union activities, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

2. Whether the Board properly found that the employer's poll of its employees tended to restrain the exercise of their organizational rights, in violation of Section 8(a)(1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B to the petition, pp. 13–14.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. THE DISCHARGE OF MARGARET JACKSON

Margaret Jackson had worked for the Company [2] as a waitress for more than five years prior to her discharge on December 3, 1966 (R. 26; 97). Although she had been chronically late in reporting for work for at least three years, her tardiness did not increase

[2] "The Company" refers to petitioners Smithville Inn and Quail Hill, which are in the business of operating restaurants in Smithville, New Jersey, and which, although separately incorporated, constitute a single integrated business enterprise (R. 8).

during the period preceding her dismissal, and the Company admittedly considered her one of the better waitresses (R. 28, 33; 114, 115–117, 221, 235).[3] At no time was she threatened with discharge should she continue to be late (R. 28; 116).

On November 28, 1966, some of the Company's employees, including Jackson, met with Union[4] representatives to plan a campaign to organize the Company's employees. On Wednesday, November 30, Jackson began distributing authorization cards at the Smithville Inn (R. 26; 62–72; 97–101). That evening, assistant chef Hand searched her apron pockets for authorization cards (R. 27; 104–105, 109). Later that same evening, dining room manager Gruhle told Jackson that Inn co-owner Mrs. Noyes was "very upset" because cards had been passed out at work (R. 26; 104).

Commencing on November 30, and continuing every night thereafter until December 7, the Union held meetings for Company employees at Jo-Jo's Bar and The Beachcomber, establishments located near the Company's restaurants (R. 9–10; 68–74). Jackson attended all these meetings, and her presence was observed by several Company supervisors (R. 27; 106

[3] Jackson's lateness was caused by problems relating to care of her asthmatic daughter. Although Jackson asked that she be transfered to a position where her lateness would matter less, she was kept at one of the most active positions (R. 28, 33; 114–116, 235).

[4] Hotel, Motel and Restaurant Employees Union, Local 508, AFL–CIO.

109, 188).[5] On November 30, when Jackson emerged from the union meeting held in the poolroom at Jo-Jo's, she sat down at the bar next to kitchen manager Dominico. He told Jackson that Inn co-owner Mrs. Noyes had sent him over to find out who the chief union organizers were, and he also asked whether she had signed a card (R. 16–17; 106–107). During the December 1 union meeting, Jackson introduced assistant chef Hand to Union president Timperio, a fact which Hand immediately reported to his superior (R. 27; 111).

Jackson did not work on Thursday or Friday, December 1 and 2. When she reported for work on Saturday, December 3, she was discharged, assertedly because of lateness. Although the Company usually allowed a discharged employee to finish out the work week, which ended on Sunday night, the Company did not permit Jackson to work either Saturday or Sunday (R. 34; 111–113).

2. THE QUESTIONNAIRE

Meanwhile, on December 2, the Union, claiming to represent a majority of the Company's employees, had requested recognition as their bargaining representative. The Company refused, and, on December 7, the Union called a strike (R. 8–9; 392–393, 137, 142). On about December 18, the Company distributed to each employee a questionnaire asking whether he

[5] The Board's finding that the Company's surveillance of these union meetings violated Section 8(a)(1) of the Act (R. 9–16) was affirmed by the court of appeals (Pet. 19). As the petition does not appear to raise this issue (see Pet. 2), the facts underlying the surveillance finding are not detailed here.

preferred, as did his employer, a secret election to determine whether the employees "want or do not want a union," or whether he preferred "a show of union application cards to some impartial third party." Although indicating that he was free not to do so, the questionnaire further requested the employee to sign it and place his initials in the box indicating his choice. (R. 391.)[6]

B. THE BOARD AND COURT DECISIONS

On the basis of the foregoing evidence, the Board found that the Company discharged Margaret Jackson because of her union activities, in violation of Section 8(a)(3) and (1) of the Act (R. 38–39). It further found that the Company's December 18 questionnaire tended to restrain employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1), because (although the purpose of the poll was not clearly explained) the employees were asked to reveal their identity, no clear and specific assurances against reprisals were given, and the poll immediately followed the employer's other unfair labor practices. (R. 24–26.) The Board ordered the Company to cease and desist from the unfair labor practices found, and from interfering in any other manner with the Section 7 rights of its employees. Affirmatively, it ordered the Company to reinstate employee Jackson and make her whole for any loss of earnings she may have suffered as a result of the discharge, and to post the usual notices. (R. 40–42, 45–46.)

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[6] The entire text of the questionnaire is set out at R. 391, and in the court of appeals' opinion, Pet. 17–18, n. 5.

The court of appeals held that substantial evidence supported the Board's findings that the Company discharged employee Jackson because of her union activities, and that the December 18 poll tended to restrain employees in the exercise of their Section 7 rights (Pet. 20–22).[7] Accordingly, it enforced the Board's order in full (Pet. 22).

ARGUMENT

1. The Company's challenge to the Board's discriminatory discharge finding raises only factual issues which do not warrant review by this Court. *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, 491. In any event, the facts summarized in the Statement (*supra,* pp. 2–4), and in the court of appeals' opinion (Pet. 20–21, n. 8), show that the Board's findings and conclusions are amply supported by the record.

2. Likewise without merit is the Company's challenge to the Board's conclusion that the December 18 questionnaire violated Section 8(a)(1) of the Act. As the court below properly concluded, the Board reasonably found that the poll was coercive in light of the facts that it "was taken against a background of unfair labor practices in the form of surveillance and the discharge of an employee because of union activity," that it "clearly sought employee identification, both by signature at the end and by initials in the box indicating the alternative chosen," and that "inadequate assurances against reprisals were given" (Pet. 22).

[7] See also n. 5, *supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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